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Supreme Court, U.S.
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No. 00-1634

In The

Supreme Court of the United States

JON D. BECKER, D.D.S.,

Petitioner,

v.

MARK MACSENTI,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

When expert opinion testimony is challenged by a Motion to Strike at the close of all evidence (and in connection with a Rule 50 Motion) instead of by a contemporaneous objection, does the danger of unfair surprise to the opposing party relieve a federal court of its duty to make a *Daubert* reliability determination?

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OPINIONS BELOW

The Opinions below are attached to Petitioner's Petition at Appendices A-C.

JURISDICTION

Petitioner adequately invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves Federal Rules of Evidence 702.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

On July 15, 1996, Respondent Mark Macsenti, sustained hypoxic brain injury as a result of the cumulative effect of exposure to Halcion, Mepergan Fortes and nitrous oxide, which were administered to him during dental implant surgery by the Petitioner Becker. Respondent's surgery was scheduled to last approximately three (3) hours. During the surgery, Petitioner displayed erratic and impaired behavior, and passed out and fell asleep approximately ten (10) to fifteen (15) times. During the surgery, Petitioner abandoned Respondent to appear in municipal court. Respondent was under the influence of the above mentioned medications for approximately ten (10) hours. While Petitioner was appearing in municipal

court, he was detained by the police for the same offense for which he was appearing in court. During processing, Petitioner exhibited slurred speech, was unsteady on his feet, and actually had to be held upright by police officers. After being bonded out of jail, Petitioner returned to his clinic to complete Respondent's dental surgery. Respondent was not discharged from Petitioner's care until 9:00 p.m., or 12 hours after originally arriving at his office. The combined effects of the nitrous oxide, oral medications and the prolonged length of the surgery caused a reduced respiratory rate in Respondent and subsequent oxygen deprivation and injury to his brain.

B. DISPOSITION BELOW

The Respondent filed his initial Complaint on August 26, 1997, and his First Amended Complaint on December 12, 1997. The federal court's jurisdiction was vested on the grounds of diversity pursuant to 28 U.S.C. § 1332. Respondent's Amended Complaint asserted a claim for negligence, intentional infliction of emotional distress, and negligence per se against the Petitioner. On June 8, 1998, a jury trial was had in the United States District Court for the Western District of Oklahoma with the Honorable Judge Robin J. Cauthron, presiding. On June 15, 1998, the jury returned a verdict in favor of the Respondent for $500,000.00 on the negligence claim, $500,000.00 on the intentional infliction of emotional distress claim, and found by clear and convincing evidence that the Petitioner acted in reckless disregard for the rights of others. On June 15th, the same jury returned a verdict of $300,000.00 for punitive damages to be assessed against the Petitioner. The judgment was filed

reflecting the above mentioned claims and amounts on June 16, 1998.

On November 13, 1998, the District Court filed an Order denying Petitioner's two (2) post-trial motions, for judgment as a matter of law and a motion entitled Alternative Motions for New Trial, Amendment of Judgment, Remittiter and/or Stay of Proceedings to Enforce Judgment. The Tenth Circuit filed its opinion on January 22, 2001, affirming judgment of the District Court except for its failure to award post-judgment interest which was requested by the Respondent by cross appeal. It is from that opinion that Petitioner requests this Court to issue a Writ of Certiorari.

REASONS FOR DENYING THE PETITION

Petitioner states that the question presented in his Petition for Writ of Certiorari is:

> "When expert opinion testimony is challenged by a motion to strike at the close of all evidence (and in connection with a Rule 50 motion) instead of by contemporaneous objection, does the danger of unfair surprise to the opposing party relieve the Federal Court of its duty to make a *Daubert* reliability determination? Pet. at i

The real question presented is whether or not a party can justify its failure to make timely objections, by blaming the trial court for its alleged error and misrepresenting to the appellate court and this Court that they are somehow surprised by the evidence presented by the Respondent's

expert, Dr. Sullivan. A timely objection is a fundamental tool utilized by attorneys to prevent irrelevant and unreliable testimony from being heard by the jury. Petitioner attempts to excuse the failure to object by arguing that the expert changed his testimony at trial. As a result of Petitioner's "surprise", they were unable to make a timely objection. The truth is, Dr. Sullivan had testified before the State Dental Board in related proceedings, and upon deposition in the underlying case and on both occasions offered the same opinion as to causation as he did at trial. Dr. Sullivan's educational background and credentials were never challenged. As the Tenth Circuit aptly pointed out in their opinion at page 21, footnote 5, App. A. Petitioner surely would object at the time the testimony allegedly changed at trial. The reason there was no objection was because there was no change in testimony.

The motion to strike, offered after the close of all the evidence and after all the witnesses had gone home, was the first notice to the Respondent and the trial court that Petitioner had questioned the reliability of Respondent's evidence. Petitioner's belated objection (now based on the flimsy excuse of surprise) was offered in spite of the fact that on opening statement, Petitioner stated that Respondent's case was based on "junk science". Trial Transcript, page 20, line 12; App. B. Yet, in spite of that statement, Petitioner argues that this "junk science" suddenly came out of left field during the trial testimony and that he had no idea that it was forthcoming.

Nothing could be further from the truth. If Respondent's expert changed his testimony at trial from his earlier recorded testimony in both the State Dental Board

hearing and upon deposition as indicated by the Petitioner, then why was said expert never cross-examined at trial using those alleged prior inconsistent statements. The reason is because his statements were not inconsistent. Although Petitioner cross-examined said expert at trial with outdated and irrelevant medical articles, he never once tried to impeach said expert with any of his previous testimony regarding the "new version" of hypoxia. Respondent's expert's opinion on causation was based on sound, well established, scientific evidence obtained readily from Physicians' Desk Reference (PDR), which is the leading text on medications, their effects and how they interact with one another. Everybody seemed to understand the expert's testimony except for the Petitioner. Petitioner has mischaracterized the expert's testimony in the post-trial motions, the argument to the Tenth Circuit and now is wanting to burden this Honorable Court.

In reality, the medicine was very simple. Respondent suffered brain damage as a result of decreased respiration due to the combination of the oral medications that he received in conjunction with the nitrous oxide over a ten (10) hour period. Although Petitioner has argued that Respondent's expert opinion on causation was not based on any reliable scientific proof or medically accepted theory, the PDR was very clear in regard to the cumulative effect of excessive medications that the Respondent received as a result of the treatment by Petitioner, as well as the potentiation effect that was created by the combination of the drugs. The oral medications were all central nervous system depressants which caused decreased respiratory rate and depth leading to a lack of adequate

oxygen going to Respondent's brain which caused the admitted brain damage.

The trial court heard and analyzed the testimony of the expert and without objection presumably found that his testimony and the foundation for said testimony was reliable and allowed testimony to proceed. Again, the causation issue is not complicated. Especially in light of the fact that Respondent was under the influence of the medications for approximately ten (10) hours with little or no monitoring. Petitioner further attempts to cloud the issue by interjecting the issue of "diffusion hypoxia" into the mix. Counsel for Petitioner is either intentionally misleading the court or is confused himself as to the difference between "diffusion hypoxia" and "defuse hypoxia". The diffusion hypoxia, that Petitioner continues to reference, had very little to do with the mechanism that brought about the brain damage to Respondent.

In support of their assault on Respondent's expert, Petitioner states that Dr. Sullivan testified that nitrous oxide passes into the blood stream. That statement is not true. Dr. Sullivan testified that because of the low ventilation and the presence of nitrous oxide in the lungs, that less oxygen passed into the blood stream, not that the nitrous oxide itself passed into the blood stream. Again, Petitioner is confused or is attempting to confuse this Court. Petitioner keeps harping on the fact that nitrous oxide when used alone is safe for extended periods of time. This premise is uncontested. The key is the oral medications, which are central nervous system depressants, caused a decrease in the respiratory rate and depth which decreased ventilation in the lungs. Because of the already decreased ventilation, the nitrous oxide made a

small contribution to the hypoxia. As a result, Dr. Sullivan was correct in his statement that there was diffusion hypoxia occurring but it was not the typical diffusion hypoxia as discussed in the medical articles dealing with the administration of nitrous oxide alone.

Next, Petitioner argues that reliable science says there is no potentiation. This statement is absurd. Common sense mandates, for example, that one should not drink alcohol and take pain medications at the same time. The increased effect of two medications acting together is "potentiation" and what Dr. Sullivan described. Because Respondent was under the influence of the sleeping pill Halcion, pain medication Demerol and the anti-nausea medication Phenergan, these three medications potentiated each other. The PDR was clear that this combination would increase the effects of the other medications and as a result recommended that the amounts of each medication given should be decreased due to this potentiation. For Petitioner to state to this court that there is no such thing as potentiation is dangerously close to being sanctionable.

Next Petitioner attempts to obviate his duty to make a timely objection by blaming the trial court for refusing to give him a *Daubert* analysis upon his motion to strike. Even a first year law student understands that a *Daubert* motion is made prior to the expert's testimony or at least contemporaneously with it. The Tenth Circuit held Petitioner to that standard which was and is the current law of the Tenth Circuit. Additionally, although Petitioner maintains that the Tenth Circuit failed to scrutinize Dr. Sullivan's testimony, they thoroughly examined in their opinion as to how Dr. Sullivan's testimony was supported

by sound scientific principles and exhibited a great understanding of his testimony as to the combination of medications and potentiation. Further it is clear from the trial court's comments both immediately following the trial and in the opinion on post-trial motion rulings that the trial court also understood the basic scientific principles and Dr. Sullivan's theory of causation. It was properly noted by the Tenth Circuit there is nothing in *Daubert* that says that the trial court cannot conduct analysis *sub silentio*.

Petitioner next argues that under the law at the time of the trial, Dr. Sullivan's expert opinion was not objectionable under the controlling case authority of the Tenth Circuit. However, his argument here is that his "*Daubert*" objection was not sustained by the trial court. This argument makes no sense. He either had grounds for a *Daubert* objection or he didn't. Petitioner then argues that the only time that he could have properly made the objection to the testimony of Respondent's expert was after all the evidence was presented. The timing of the objection and the motivation behind this appeal are suspect, especially when examined in conjunction with Petitioner's statement in opening argument that Respondent's case was based on "junk science".

Lastly, in response to the Tenth Circuit's opinion that at the very least, Petitioner should have objected to Dr. Sullivan's testimony when he introduced his "new version" of diffusion hypoxia, Petitioner argues that changed testimony is not grounds to object. Petitioner argues that he assumed that Respondents would offer additional evidence to support the new version. There is no basis for

that argument in that Respondent had no additional witnesses to offer in regard to causation. The only other expert to testify was a neuropsychologist who had no opinion as to causation and had expressed that to Petitioner in a pre-trial deposition. As a result, Petitioner knew that Dr. Sullivan's testimony was the last evidence to be presented by the Respondent in regard to causation.

The bottom line is Petitioner has no valid or credible argument for the failure to make a pre-trial and/or contemporaneous objection to the expert testimony. Counsel for Petitioner stated on opening that Respondent's case was based on "junk science". Dr. Sullivan testified consistent with his previous testimony and Petitioner's alleged "new version" is simply a red herring. For the above reasons and the arguments to follow, Respondent respectfully requests this Honorable Court to deny the petition for writ of certiorari.

I.

The Tenth Circuit's opinion does not conflict with this court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Weisgram v. Marley Company*, 528 U.S. 440, 120 S.Ct. 1011, 145 L. Ed. 2d 258 (2000). In *Daubert*, the court ruled that the Federal Rules of Evidence, specifically 702, govern the admission of expert testimony in federal trials. While it did assign the "gate keeping" responsibility to the trial judges to ensure that the evidence presented was both relevant and reliable, it gave the trial court broad latitude in doing so. It prescribed no specific rules as to what particular factors would be used

in making the reliability determination and made no requirement of the *sua sponte* assessment on the record absent timely objection.

Petitioner states in his petition that the Tenth Circuit sanctioned the trial court's abandonment of this "gate-keeping" obligation. In fact, the Tenth Circuit assumed that the trial court performed its function *sub silentio* in light of the fact that the Petitioner failed in his obligation to make a timely objection. It is well settled in the Tenth Circuit and other Circuits that failure to make an objection waives the right to review absent plain error. This court will recall that *Daubert* was a case decided on a motion for summary judgment by the trial court in which the issue of the expert's reliability was fully briefed by both sides and the court made a fully informed decision based upon the evidence and arguments presented. The Tenth Circuit's reasoning behind the requirement of making a timely objection is to allow the court to make a reviewable ruling if that issue is appealed, and allow the plaintiff to offer additional argument and evidence if needed to demonstrate the reliability of the expert's testimony. The Tenth Circuit's opinion was based upon sound legal precedent and fundamental fairness.

Petitioner argues that the Tenth Circuit's reasoning of "unfair advantage" is counter to the holding in *Weisgram*. Petitioner's reliance on *Weisgram* is misplaced. *Weisgram* held that Rule 50 permits an appellate court to direct entry of judgment as a matter of law when it determines that the evidence was erroneously admitted at trial. This court has previously ruled on that issue in the case of *Neely v. Martin K Aby Construction Co.*, 386 U.S. 317, 87

S.Ct. 1072, 18 L. Ed. 2d 75 (1967). It is true that in *Weisgram* this court ruled that there would be no unfair advantage. In *Weisgram* the Plaintiff had offered all the evidence and arguments that they could to shore up their expert's testimony because the Defendant had challenged the expert's testimony both in a pre-trial motion and contemporaneously with the offer of the evidence.

As a result of those pre-trial and contemporaneous challenges to the testimony, there is no doubt that *Weisgram* was "on notice every step of the way" that the expert's testimony would be facing great challenges to the admissibility. Therefore, this court ruled there could be no unfair advantage.

In the present case, no objection was made either before or during the trial testimony and as a result the plaintiff had no need to "shore up the plaintiff's testimony". Further, because in *Weisgram* the proper objections were waged at the trial level, the Eighth Circuit reviewed the evidence in question. In this case, because there was no objection to the testimony, the Tenth Circuit ruled that any objection was waived and therefore reviewed only for plain error. As a result, the *Weisgram* case is clearly distinguishable from the present case and is not in conflict with the Tenth Circuit's opinion here.

II.

The requirement of a timely objection is fundamental to trial advocacy. A special custom built exception for expert testimony should not be carved out by this Court to benefit the Petitioner. Petitioner attempts to argue that this court needs to grant certiorari, and render an opinion

as to when a *Daubert* objection must be made. Objections are made in a timely manner in an effort to limit irrelevant and unreliable testimony as well as to allow the court to make reviewable rulings for appeal. Petitioner cites cases from the Ninth Circuit, the Tenth Circuit, the Eleventh Circuit, which hold that no *sua sponte Daubert* analysis need be performed when a timely objection is not made. However, Petitioner fails to cite any persuasive authority that holds otherwise. He simply argues that the trial court cannot make an adequate decision until all the evidence is in. This argument flies in the face of all motion and trial practice. Although the Petitioner filed numerous motions in limine in this case, he neglected to file any pleading on this critical issue to limit Respondent's expert testimony. Petitioner's position is increasingly suspect when examined in light of Petitioner's counsel's bold declaration in opening argument that Respondent's case was based on "junk science". Petitioner is simply seeking a reprieve from this Honorable Court, to be rescued, and ultimately rewarded for his failure to make a timely and proper objection.

Petitioner argues that the trial court made no *Daubert* analysis. The Rules of Evidence require the court to continuously evaluate the evidence as it is offered to ensure its relevance and reliability. Because Petitioner failed to make timely objections the trial court was silent as to this analysis. Petitioner now attempts to use that silence against the trial court. While it is true that the trial court in response to Petitioner's motion to strike at the close of the evidence did not elaborate on the specifics of any *Daubert* analysis, it is clear from the trial court's rulings and judicial commentary that Dr. Sullivan's testimony

was comprehensible and reliable. In fact, in the argument for judgment as a matter of law in regard to co-defendant Heather Davis, the trial court stated on the record that the nitrous oxide had little to do with the injury to Respondent but that it was polypharmacy and the effects of medication on each other that caused Respondent's brain damage. Petitioner seems to want this court to believe that the trial court neglected to conduct an evidentiary analysis and because there was no objection made, did not listen to the testimony and refused to perform a "gatekeeping" function. That is clearly not true. The court has a continuing obligation to make sure that the evidence presented is both relevant and reliable and the trial court did that in this case.

Petitioner continues to recycle the argument that he had no idea that Dr. Sullivan was going to change his testimony and that's the reason he did not make a *Daubert* objection. Petitioner cannot be allowed to run from the opening statement of his counsel which set the tone for the trial and laid the foundation for this appeal. If Petitioner knew before Dr. Sullivan ever testified that his opinion was based upon "junk science", then he cannot make an honest argument as to surprise. If Petitioner wasn't surprised (and he wasn't) Petitioner's entire argument must fail.

CONCLUSION

The trial court properly denied Petitioner's request for *Daubert* analysis at the close of the evidence and the Rule 50 motion. The Tenth Circuit properly upheld the

trial court's decision. Petitioner argues that both the trial court and the Tenth Circuit failed in their duties to assure that testimony offered at the trial was reliable. It is simply not the case. In truth, it is Petitioner's counsel's failure that has him in this position and this Court should not reward that failure by granting the petition for certiorari. As a result Respondent respectfully requests this Honorable Court to deny petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

[1] UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MARK MACSENTI,

Plaintiff,

vs. CASE NO. CV-97-1398-C

JON D. BECKER, D.D.S., and HEATHER DAVIS,

Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
MONDAY, JUNE 8, 1998
BEFORE THE HONORABLE ROBIN J. CAUTHRON,
JUDGE PRESIDING

JURY TRIAL – VOLUME I OF VI

APPEARANCES

FOR THE PLAINTIFF: MR. KIRK OLSON
MR. TODD GOOLSBY
Attorneys at Law
Oklahoma City, Oklahoma

FOR THE DEFENDANTS: MR. JACK S. DAWSON
MR. STEVEN E. BRACKLEIN
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* * *

[20] doctor who teaches pharmacy at the OU med school. I think you'll see that he knows what he's talking about.

The combination of all of these, there have been studies done – there has never been a study done of these exact drugs in combination. It just hasn't been done. All of the studies ever done of anything like this, of any drugs similar, all show that they are not harmful to take – to be taken in combination. It's just scientifically wrong to say that they are.

The N20, the nitrous oxide, does not compete with oxygen in your blood stream. It cannot compete with oxygen in your blood stream. Oxygen is carried by hemoglobin. N20 can't even bind with hemoglòbin. That is bunk. Junk science is what that is.

You will meet Mark Macsenti. Mark Macsenti is a pretty nice guy. He was born and raised out in California. He principally worked as a waiter and construction jobs, which is fine, and learned to play the guitar. His claim to fame is a guitar player and a composer of songs and an artist. Kind of a poetic kind of fellow.

In 1992, you'll learn that Mark Macsenti moved to Oklahoma to live in a house that his mother had inherited from his grandfather. His mother still lives out in California. A small house out by Clinton. He comes to Oklahoma in 1992 and starts to work. In 1992, the whole year, he made $1,320. His occupation, I don't know exactly what it was. The income tax are blank for that year.

* * *

APPENDIX B

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MARK MACSENTI, Plaintiff-Appellee and Cross-Appellant, v. JON D. BECKER, D.D.S. Defendant-Appellant and Cross-Appellee, HEATHER DAVIS, Defendant.	)	Nos. 98-6485, 99-6012

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CV-97-1398-C)

(Filed Jan. 22, 2001)

Robert Todd Goolsby, Goolsby, Olson & Proctor, Oklahoma City, Oklahoma (Kirk Olson and David Proctor with him on the briefs) for Appellee and Cross-Appellant.

Jack S. Dawson, Miller Dollarhide, Oklahoma City, Oklahoma, (James A. Scimeca and Steven E. Bracklein with

him on the briefs) for Appellant and Cross-Appellee.

Before **EBEL, HOLLOWAY** and **HENRY**, Circuit Judges.

HOLLOWAY, Circuit Judge.

* * *

We are convinced that the motions were untimely here.[5] By waiting until after the close of all the evidence to raise the *Daubert/Kumho* objection, basic errors occurred. The proponent of the evidence was deprived of the opportunity to offer other supporting proof from Dr. Sullivan and from literature. Moreover the trial judge was

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[5] Defendant seems to try to justify his failure to make contemporaneous objections at trial on the *Daubert* issue by asserting that he was surprised by a change in Dr. Sullivan's theory, his testimony at trial allegedly being in conflict with testimony he had previously given before the Oklahoma Board of Dentistry. On its face, however, this rationalization fails: If the testimony was unexpected and a departure from the witness's previously expressed opinion, that would seem to amplify the motivation to raise the issue at once. Objection should have been made *at the latest* when the allegedly new and different explanation was given at trial.

This would have given the trial judge the opportunity to evaluate the basis of the testimony and would have given the plaintiff the opportunity to provide further foundation for the testimony. We also note that defendant had taken Dr. Sullivan's deposition before trial and explored the basis for his opinion, *see* III App. 692-93, and in opening statement characterized Dr. Sullivan's theory as "junk science," II App. 328. In short, we are not convinced that defendant was surprised by the trial testimony, but in any event nothing excuses the failure to make timely objection at trial.

disadvantaged in that she was not alerted to the need of stating *Daubert/Kumho* findings and analysis. And, obviously, appellate review by us is impaired as well, due to the inadequacy of the record. Accordingly on this record and persuasive precedent we hold that the *Daubert/Kumho* objection was waived, and our review is only for plain error.

On careful review of this record, we find no plain error in the rejection by the trial judge of the belated *Daubert* objection. Dr. Sullivan's general theory was that the injury here resulted from the excessive combined use of central nervous system depressants. His opinion on the specifics of this case, in the absence of published studies on this

* * *